No. 298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

LEO ZITTMAN (with whom The Chase National Bank of the City of New York was impleaded below),

Petitioner,

against

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, ZITTMAN

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This case is a companion to the case, also here on certiorari, entitled "Leo Zittman (with whom the Federal Reserve Bank of New York was impleaded below), petitioner, against J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, respondent,"

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[1] J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General. The terms "Custodian" and "respondent" are used interchangeably to refer either to the Alien Property Custodian or to the Attorney General who succeeded to the Custodian's powers and duties. Exec. Order No. 9788, 1 C.F.R. 1946 Supp. 169.

No. 299. For convenience, the latter case will be referred to as the "Federal Reserve case".[2]

Opinions Below

The *per curiam* opinion of the Court of Appeals for the Second Circuit is reported at 182 F. 2d 349 (R. 150). The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740 (R. 71).[3]

Jurisdiction

The judgment below was rendered June 2, 1950 (R. 151). Petition for rehearing was filed June 15, 1950, and denied on June 27, 1950 (R. 153). Jurisdiction of this Court is invoked under Title 28 of the U. S. Code, § 1254, writ of certiorari having been granted on November 13, 1950 (R. 155).

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[2] The instant case and the Federal Reserve case were brought by respondent to test the force of a New York state court attachment levied, in a single action brought by petitioner, upon certain blocked bank accounts maintained by two German banks with the Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, respondent filed two separate proceedings in the District Court. One was directed to the attached accounts maintained with the Chase Bank. The other was directed to the attached accounts maintained with the Federal Reserve Bank. Each bank was a party to only that proceeding in the District Court which involved the particular accounts maintained with it. Though the two cases were heard on separate records and briefs and resulted in separate judgments below, they were dealt with by a single opinion both in the District Court and in the Court of Appeals. Neither bank appealed the judgment of the District Court. The instant case was brought to test the validity of the attachment. The Federal Reserve case was brought to test the Custodian's right to possession of the attached accounts, irrespective of the validity of the attachment. The courts below treated the cases as involving the same issues.

[3] The record in the instant case and in the Federal Reserve case have been bound together. Record references are to pages of combined record except where indicated otherwise.

Statutes Involved

1. The Congressional Joint Resolution of May 7, 1940, amending § 5(b) of the Trading with the Enemy Act and the relevant portions of Executive Order 8389, as amended, issued pursuant thereto. Appendix, pp. 47-48.

2. The New York Civil Practice Act, the relevant portions of which appear in Appendix, *infra*, pp. 50-54.

3. The New York Judiciary Law, the relevant portions of which appear in Appendix, *infra*, pp. 49-50.

Nature of the Proceedings

This case presents for determination the rights acquired by an American citizen by reason of a pre-war suit brought by him in a New York state court against two German banks.[4] Petitioner, unable to obtain personal service of process upon the non-resident German banks (R. 50), sued them in the state court by attaching certain bank accounts maintained by the German banks with the Chase National Bank of New York City (hereinafter called "Chase Bank"). These bank accounts were then blocked under the freezing controls of Executive Order 8389 (5 F. R. 1400). Petitioner attached on December 11, 1941, and took judgment on March 27, 1942.

In October, 1946, almost five years after the attachment, respondent vested the right, title and interest of the German banks in the attached bank accounts. Some sixteen months later, respondent asserting, in effect, that the attachment was void as against the German banks—whose rights he was seeking to enforce—because the funds levied upon had been blocked by the freezing controls of Executive Order 8389, petitioned the District Court for the Southern

[4] The Reichsbank and the Deutsche Golddiskontbank, herein called the "German banks".

District of New York for a declaratory judgment decreeing, in effect, that, because of the freezing controls, petitioner's attachment was void and that the German banks—and respondent as their successor—were entitled to the attached funds.

The District Court granted the relief sought by petitioner and the Court of Appeals for the Second Circuit has affirmed.

Statement of the Case

The material facts are undisputed (R. 71).

On December 11, 1941, before war was declared against Germany, petitioner Zittman, a resident citizen of the United States, sued in the Supreme Court of the State of New York for Kings County on a claim against the two German banks (R. 48). The cause of action sued on arose in July, 1937 (R. 49)—some three years before the freezing controls were promulgated.

Both German banks were foreign corporations with offices in Germany; neither was amenable to personal service (R. 50). Petitioner, being unable to sue *in personam*, proceeded by attachment. On December 11, 1941, the state court issued a warrant of attachment to the Sheriff. The Sheriff levied upon the blocked accounts maintained by the two German banks with the Chase Bank by serving a certified copy of the warrant on the Chase Bank on December 11, 1941, at 2.41 P. M., E. S. T. (R. 49, 67).[5] Service of the warrant effected a seizure of all of the rights of the

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[5] Petitioner attached on December 11, 1941, at 2:41 P. M., E. S. T.—before war with Germany began on December 11, 1941, at 3:05 P. M., E. S. T. (55 Stat. 796). On the same day, at 2:20 P. M., E. S. T., the Sheriff made like service on the Federal Reserve Bank of New York (R. 126-7, 136, 103). The Federal Reserve levy attached certain accounts of the Reichsbank only. Apparently, the Federal Reserve held no credits or property for the Golddiskontbank. The attachment in the case of the Federal Reserve was made the subject of a separate petition below. The judgment on this latter petition is also here on certiorari in a companion case, No. 299.

German banks in the attached accounts (N. Y. *Civil Practice Act*, § 916[3]).

In response to the warrant, the Chase Bank certified to the Sheriff those credits, totalling $57,005.33, and securities which it held for the German banks and reported that the same were held by it "subject to Executive Order No. 8389, as amended" (R. 59). The attached property continues to this day to be blocked under the federal freezing controls.

Although frozen, the bank accounts were attachable. This is clear from the formal stipulation of fact in this case which states the following (R. 65-66):

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. * * * A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

It is not denied that these rulings of the Secretary of the Treasury are binding upon respondent. At all of the times material here, the Treasury administered the freezing controls under a delegation of power by the President (Exec. Order 8389, § 7).

The provisional jurisdiction acquired by the state court attachment was perfected. As required by state law, summons was regularly served on the two German banks by publication and copies of the summons, complaint and other requisite documents were regularly mailed to the Attorney General of the United States on behalf of the two German banks. Respondent acknowledged receipt of the mailing (R. 50, 64-65).

Neither of the German banks nor the U. S. Attorney General appeared in the state court action or took any steps therein. On March 27, 1942, petitioner took judgment in the state court action against the German banks for a total of $146,724.40 and costs (R. 50).

Respondent concedes that the state court attachment proceeding was regularly begun and reduced to judgment.

No execution has issued to enforce petitioner's judgment out of the attached blocked property (R. 5). It is agreed by all parties that execution cannot issue until a federal license is granted, under the freezing controls, authorizing application of the blocked funds to payment of the judgment. Pending application for, and issuance of, such a license, petitioner has, from time to time, applied for and secured orders of the state court extending the time within which the Sheriff might sue to reduce the attached funds and property to his possession. These orders have been duly and regularly served on the Chase Bank (R. 51, 27). By reason of the service of these orders, the funds and securities continue under attachment (N. Y. *Civil Practice Act*, § 922). The attachment has never been

vacated, released, discharged or otherwise annulled (R. 52, 27).

Almost five years after petitioner attached, the Alien Property Custodian executed two limited vesting orders affecting the attached accounts.

One, Vesting Order No. 7792, was executed October 3, 1946, and purported to vest the *right, title and interest* of the Reichsbank in its account with the Chase Bank (R. 9-11). The other, Vesting Order No. 7870, was executed October 14, 1946, and purported to vest the *right, title and interest* of the Golddiskontbank in its accounts with the Chase Bank (R. 14-15).[6]

These vesting orders necessitated a judicial determination of the *quantum* of interest remaining in the German banks after the attachment, for it is conceded that only this residual interest was vested by respondent.[7] To secure this determination, respondent instituted the present summary proceeding against petitioner, joining the Chase Bank and the Sheriff.[8]

The District Court, upon the authority of *Clark* v. *Propper*, 169 F. 2d 324, held that the attachment was void as to the German banks and, in effect, that they were entitled to the whole of the attached accounts. It awarded a declaratory judgment to respondent, who claimed only the interest of the German banks under his limited vesting orders (R. 76-78). The Court of Appeals affirmed solely on the authority of *Propper* v. *Clark*, 337 U. S. 472. Certiorari was granted by this Court on November 13, 1950 (R. 155).

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[6] The District Court adjudged the orders to be "right, title and interest" vesting orders (R. 77).

[7] The limited force of a "right, title and interest" vesting order is discussed hereafter. Brief, *infra*, pp. 14-17.

[8] The proceeding was heard summarily on respondent's petition and the answers thereto, as supplemented by a stipulation of facts (R. 64-70).

Specification of Errors

The Court below erred:

1. In holding that the pre-war attachment by petitioner —an American citizen—of the blocked funds of the German banks for jurisdictional purposes, in aid of petitioner's action against the non-resident German banks is void, notwithstanding respondent's concession in this case (R. 65-66) that, under Presidential Executive Order No. 8389, "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden" by the freezing controls "but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action".

2. In refusing to hold that this case is controlled by *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, and in holding, instead, that this case is controlled by *Propper* v. *Clark*, 337 U. S. 472.

3. In refusing to hold that the District Court should not have entertained this cause because,

(a) this proceeding was an unwarranted collateral attack on petitioner's state court judgment, in violation of the full faith and credit clause of the Federal Constitution;

(b) this proceeding precipitated a conflict of jurisdiction over a *res* in violation of the settled rule of comity between state and federal courts; and

(c) a full and adequate summary remedy was available to respondent in the state court.

4. In refusing to reverse the judgment of the District Court.

Summary of Argument

I. Here the Custodian vested by a *right, title and interest* vesting order. Such a vesting raises issues totally different from those raised by a *res* vesting.

A *res* vesting order entitles the Custodian to summary custody of the vested property subject to the rights of non-enemies who may have interests in, or claims against it. The Custodian takes the property subject to such interests and claims as they are determined in a later suit under Sec. 9 of the Trading with the Enemy Act. The Custodian issues a *res* order when he elects to take summary custody of the property and to relegate adjudication of adverse rights to a later suit under Sec. 9.

A *right, title and interest* vesting order entitles the Custodian to only such interest as the enemy may have in the vested property. Such a vesting order is effective only after the Court, in a proceeding such as this, has determined the extent of the enemy interest and has awarded that interest to the Custodian. The Custodian issues a *right, title and interest* vesting order when he elects to have a judicial determination of adverse interests in the property before he takes it into his custody.

Whichever order issues, the Custodian must, under the Fifth Amendment, respect the rights of non-enemies in the vested property.

It is agreed that *right, title and interest* orders were issued here. Therefore, to succeed here respondent must establish that petitioner's attachment was void as against the German banks whose interests, alone, he claims.

II. Petitioner's attachment is valid.

A. The freezing controls in force when petitioner attached were those authorized by the Congressional Joint Resolution of May 7, 1940, which amended Sec. 5(b) of the Trading with the Enemy Act. These were peacetime controls authorizing the Executive to screen dealings in

frozen property in order to protect it against Axis conquest. (In 1933, Sec. 5(b) had been made applicable in peacetime national emergencies as well as in wartime.)

The controls of Sec. 5(b) did not, even in time of war, proscribe suits against frozen property. Both at common law and under the Trading with the Enemy Act it is settled that, in wartime, a citizen may sue and attach the property of the enemy. Nothing in the purpose or context of the controls suggests a different rule for peacetime application.

As construed below, the controls immunize frozen Axis property from suits by citizens. This defeats the purpose of the controls; it distorts them from a check upon the Axis to a check upon American citizens.

The Secretary of the Treasury, in administering the controls, ruled specifically that frozen property was subject to suits by citizens.

B. Regardless of whether the Secretary had the power to proscribe attachments, he made it clear that they were beyond the ambit of the controls. He ruled specifically that the controls did not limit suits and that no license was needed to attach. As *amicus* in the *Polish Relief* case, the Secretary advised the New York State Court of Appeals that he had authorized attachment of frozen funds. He urged the New York courts to take jurisdiction of attachments without a license.

The New York courts have adhered closely to the Treasury's ruling. They entertain litigation against frozen funds, including attachments, but, as required by the Treasury, withhold payment of the judgment until the execution is federally licensed. This procedure was approved by this Court recently in *Lyon* v. *Singer*. Since petitioner's attachment and judgment were obtained in this approved manner, they should have been upheld below.

Respondent insists that, although the Treasury gave authority to attach, the attachment must be regarded as

void when levied but validated *ab initio,* when a post-judgment license issues permitting execution on the judgment. Nothing in the Secretary's ruling, stipulated to here, affords any basis for so limiting the force of the authority given by the Secretary. Moreover, if so limited, the ruling would be an attempt to authorize as valid an attachment forbidden by the Constitution. Under the Fourteenth Amendment, as construed in *Pennoyer* v. *Neff,* an attachment, to be valid, must reach the property levied upon before judgment. Its validity or force cannot be made to depend upon whether or not a post-judgment Treasury license will ultimately issue. The Treasury must be taken to have authorized a valid attachment—not one void under the Constitution.

The Treasury and respondent have licensed payment of numerous judgments resting on attachments of frozen funds. Under *Pennoyer* v. *Neff,* these judgments were void if, as respondent asserts, the attachments did not, prior to judgment, reach the frozen property levied upon. Under respondent's view, he and the Secretary have exposed the Sheriff and the garnishee banks to a huge double liability for having paid void judgments, on the authority of Treasury licenses.

C. In *Lyon* v. *Singer,* this Court affirmed the holding of the New York State Court of Appeals that an unlicensed suit, based upon an unlicensed post-freezing transaction, resulted in a judgment which created valid rights *in rem* against frozen funds (previously vested by the Custodian) but that execution upon the judgment must await federal license. Under *Lyon* v. *Singer,* the instant case is *a fortiori* because petitioner's attachment was authorized and levied on a cause of action which pre-dated freezing.

The court below misplaced its reliance on *Propper* v. *Clark.* *Lyon* v. *Singer* limited *Propper* to the case of a claim of title to frozen funds asserted against the Custodian's paramount power to vest. The instant case differs from *Propper* in both aspects. Thus, (a) peti-

tioner's attachment effected a lien—not a shift of title; and (b) since the Custodian vested only the right, title and interest of the German banks in the attached accounts, he chose not to put in issue his paramount power to vest. The *Singer* case—not *Propper*—applies here.

III. Below respondent rested his case on Gen. Ruling 12, issued April 21, 1942, more than four months after petitioner attached. He would apply this Ruling retroactively to petitioner's attachment. He argued that Gen. Ruling 12, if so applied, would permit attachment of frozen funds and, at the same time, insulate the funds from every consequence of an attachment until execution on the ensuing judgment were licensed.

A. Gen. Ruling 12 has severe criminal sanctions. Therefore, the Constitution forbids its application retroactively to void petitioner's attachment. Since this Court held in the *Propper* case that Gen. Ruling 12 does not operate retrospectively, it has no application to this case.

B. Even if applicable, Gen. Ruling 12 would confirm—not deny—the validity of petitioner's attachment. Subd. 3 of the Ruling states that a transfer (defined to include attachments) is valid if at any time authorized by the Treasury. It is agreed here that petitioner's attachment was so authorized. Therefore, its validity is confirmed by subd. 3.

Even subd. 4 of the General Ruling—on which respondent relies—validates an attachment for the purpose of a judgment determining the rights and liabilities of the litigating parties. Such a judgment necessarily adjudicates the validity of the attachment. Therefore, under subd. 4, petitioner's state court judgment is a holding that his attachment is valid, which binds the German banks and respondent as their privy.

If, as respondent asserts, subd. 4 purports to authorize an attachment and, at the same time, to insulate the property levied upon from the consequences of the attachment,

it is void under the Fifth Amendment as being too contradictory to be intelligible and under *Pennoyer* v. *Neff* as authorizing an attachment procedure forbidden by the Fourteenth Amendment. Subd. 4 should be construed so as to make it valid, not offensive to the Constitution.

IV. The District Court should have remitted respondent to the state court.

A. The state court, by the attachment, had taken exclusive prior custody of the attached bank accounts and, by its judgment, held them to be attachable. The adjudication bound the German banks and respondent as their privy. The judgment below voids the state court judgment and so is an unlawful collateral attack on that judgment, in violation of the full faith and credit clause of the Constitution.

B. Under the rule of comity between state and federal courts in contests over a *res*, the state court's prior jurisdiction over the attached accounts was exclusive. Therefore, respondent should have sought his remedy in the state court, since the rule of comity applies even when the U. S. is the suitor. The rule of comity, enforced by this Court for almost a century, is denuded of meaning if, as here, the state court's prior custody of the *res* may be destroyed and its injunction protecting that custody may be ignored.

C. Respondent admits that, despite the judgment below, he must still ask the state court to release its attachment and injunction and deliver the funds to him. Thus, two proceedings are required to do what might have been done on one application if the respondent had petitioned the state court in the first instance. Since the declaratory relief granted below was unnecessary and multiplies the litigation, it should have been denied.

ARGUMENT

I

By issuing right, title and interest vesting orders, respondent intentionally limited his seizure to the residual interest in the attached bank accounts, remaining in the German banks after giving effect to petitioner's attachment. By issuing such limited vesting orders, respondent chose to forego his right to preliminary custody of the whole of the attached accounts and to take only the residual interest of the German banks, as determined by the Court.

The Custodian's vesting orders are of two kinds. One—the so-called *res* vesting order—is a seizure of designated property. The other—the *right, title and interest* vesting order—seizes merely the enemy's interest in designated property.[9]

A *res* vesting order is a preliminary seizure. The Custodian takes the property regardless of—but without prejudice to—the rights of others who have claims against it. The Custodian must respect the rights of others to the property as determined by a later suit under Sec. 9 of the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569; *Stoehr* v. *Wallace*, 255 U. S. 239, 245-246.

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[9] "Vesting action by the Custodian may take two forms. He may vest the 'right, title and interest' of an enemy in and to property or he may issue a *res* vesting order by which he vests the asset itself. In *Stern* v. *Newton*, 39 N. Y. S. 2d 593, 598 (1943), the difference between the two orders was expressed in this fashion: 'Where the Custodian seizes only the right, title and interest of an enemy national, a question is presented as to the extent of that interest. * * * But where the Custodian vests the particular property, as distinguished from the interest of the enemy national in the property, he takes the entire right, title and interest therein, regardless of the quantum owned by the enemy national'." Robert M. Vote, Estates and Trust Branch Office of Alien Property (1949), *Alien Property Litigation in World War II*, p. A-3.

By a *right, title and interest* vesting order, the Custodian merely takes the interest of the enemy in the designated property. Such an order is effective only if, and to the extent that, the enemy has an interest in the property. The enemy's interest delimits the Custodian's rights. The vesting order does not contract or enlarge that interest. If the enemy's interest is disputed, as here, the dispute must be resolved by the Court before the vesting order can take effect. *Kahn* v. *Garvan*, 263 Fed. 909, 912; *Miller* v. *Rouse*, 276 Fed. 715, 716; *U. S.* v. *The Antoinetta*, 153 F. 2d 138, 143; *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609, 613, aff'd on rehearing 31 F. 2d 553, cert. den. 279 U. S. 862; *Mayer* v. *Garvan*, 270 Fed. 229, 239; *In re People by Beha, Supt. of Ins.*, 256 N. Y. 177, 187, cert. den. 284 U. S. 633; *U. S.* v. *The Saw Leonardo*, 51 F. Supp. 107, 109; *The Pietro Campanella*, 47 F. Supp. 374, 377, 380; *Clark* v. *Edmunds*, 73 F. Supp. 390, 392-394; *Chase Nat. Bank* v. *Reinicke*, 76 N. Y. S. 2d 63, 65.

It is discretionary with the Custodian whether to vest enemy property. *Clark* v. *Allen*, 331 U. S. 503, 511. If he elects to vest, he chooses which type of vesting order shall issue. He issues a *right, title and interest* vesting order, if he elects to have a judicial determination of adverse interests in the property before it is taken into his custody. He issues a *res* vesting order, if he elects to take immediate custody of the property and to relegate the adjudication of adverse rights to a later suit under Section 9 of the Trading with the Enemy Act. *Kahn* v. *Garvan*, 263 F. 909, 912; *Stern* v. *Newton*, 180 N. Y. Misc. 241, 39 N. Y. S. 2d 593, 598.

Whichever course the Custodian pursues, he must respect the rights of non-enemies in the vested property. The vesting power—whether exerted through a *res* or a *right, title and interest* order—is limited by the Fifth Amendment. The latter permits nothing less. *Miller* v. *Kaliwerke*, 283 Fed. 746, 757-758; *Commercial T. Co.* v. *Miller*, 231 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479.

Here the vesting orders are clearly of the *right, title and interest* variety. The judgment below so decrees (R. 77). Respondent so concedes. Thus, in his brief below (p. 5), respondent said:

> "* * * The orders, however, contain no finding that prior to vesting the German banks were in truth entitled to the entire balances of the accounts as stated on Chase's books. Appellee agrees with appellants that the vesting orders in this case left open for subsequent judicial determination the amount of the debts actually owing to the German banks and the valid ownership interests, if any, acquired in the accounts by third persons. The Custodian has likewise conceded that the demand letters which he served upon Chase [R. 11-13, 16-18] are not equivalent to turn-over directives which, had they been issued in implementation of the vesting orders, would have constituted a determination that a specific designated corpus was enemy property required to be delivered to the federal authorities * * *."[10]

Having chosen to waive his right to immediate custody and to have a judicial determination of adverse rights in the vested property at the outset, the Custodian could not take the vested bank accounts free of the attachment unless he established that the attachment was void as against the German banks, whose interests, alone, he claims.

Petitioner says that he validly attached the Chase accounts. The attachment impressed a lien upon these accounts to secure his judgment.[11] Therefore, when the later vesting orders were made, the interest of the German banks

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[10] In his brief in the District Court, respondent put the matter thus: "In fine, the Custodian purported to vest only whatever interest the German banks might have had in the account * * *. The range of inquiry, therefore, open to this Court is *identical* with that in *Markham* v. *Allen*, 326 U. S. 490, 494 * * * where the Custodian vested only the 'right, title and interest' of enemies to certain property, reserving for an appropriate court in a proceeding of the present nature a determination of the *quantum* of interest acquired under his Vesting Orders."

[11] This is the law of New York. *Post*, p. 32, footnote 29.

in the Chase accounts was limited to the residue, remaining after satisfaction of his attachment lien. The Custodian took only this residue—no more.

Respondent would agree, except for the impact of Executive Order No. 8389. In his brief in the District Court he said, "But for the impact of Executive Order No. 8389 as amended, and regulations of the Treasury Department issued pursuant thereto, it is conceded that under the law of New York both the attaching creditors and the Sheriff would have acquired liens on the applicable funds through the attachments and levies." However, he said, "the application of the Executive Order prior to the issuance of the attachment and levies barred the acquisition of any interest by the respondents in the property through judicial process or otherwise."

The merits of the case turn upon whether, under the freezing controls of Executive Order 8389 as applied by the Treasury Department, frozen funds could be validly attached.

II

The attachment of frozen funds was permitted by the freezing control program. Therefore, respondent vested subject to petitioner's attachment.

Petitioner attached on December 11, 1941. The levy preceded war with Germany.[12] The Trading with the Enemy Act was not then in force as to Germany. At that time, the Custodian was without power to vest the attached

[12] Petitioner attached on December 11, 1941, at 2:41 P. M., Eastern Standard Time (R. 67). War with Germany began on December 11, 1941, at 3:05 P. M., Eastern Standard Time (55 Stat. 796).

property.[13] The United States, neither directly nor through any agency, did, or could, claim any proprietary interest in the attached accounts.

Petitioner's attachment created no contest between himself and the United States. The parties to the state court litigation were—and remained throughout—petitioner as plaintiff and the German banks as defendants.

Except for the later limited vesting orders, respondent would have no standing to question the validity of the attachment. By these orders, he deliberately chose the status of successor to the rights of the German banks. He asserts their rights as their privy. It is as if the German banks were here contesting the validity of petitioner's attachment made on December 11, 1941. If they could not prevail, neither can respondent.

The German banks could not have employed the freezing controls to defeat the attachment because——

(a) the freezing controls were protection against—not for—German nationals,

(b) the Secretary of the Treasury authorized attachment of frozen funds; and

(c) petitioner's attachment is clearly valid under this Court's holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*.

[13] The Custodian had no power to vest German property until the Trading with the Enemy Act became effective as to Germany at midnight on December 11, 1941. Trading with the Enemy Act, § 2 (50 U. S. C. A., Appendix).

A

The freezing controls were a peacetime emergency measure designed to protect, against Axis conquest, property here belonging to nationals of the invaded countries. Suits by Americans against frozen property were not proscribed.

The freezing controls rest upon the authority given to the President by Sec. 5(b) of the Trading with the Enemy Act.[14]

When Germany invaded Norway and Denmark, the President declared a national emergency. This declaration reactivated his powers under Sec. 5(b) of the Trading with the Enemy Act. It enabled him to employ these powers to protect against German conquest securities and credits located here, belonging to Norway and Denmark and their nationals. Sec. 5(b) made these powers available to the President in time of "national emergency" as well as during time of war. The remainder of the Trading with the Enemy Act—including the vesting power—was effective only in war time.[15]

Acting under Sec. 5(b), on April 10, 1940, the President issued Executive Order 8389 (5 F. R. 1400), freezing desig-

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[14] § 5(b) was enacted originally in 1917 as part of the Trading with the Enemy Act [40 Stat. 411, § 5(b)]. It was a catch-all enabling control of transactions not otherwise controlled by that act. The end of the first World War terminated the effectiveness of § 5(b) as well as the other controls of the Trading with the Enemy Act.

§ 5(b)—alone—was revised on March 9, 1933, to meet the domestic crisis engendered by the depression. On that day, it was amended so that the powers granted would be available to the President in war or "during any other period of national emergency declared by the President" (48 Stat. 1). The amendment was directed to the domestic crisis solely. The obvious purpose of the amendment was to enable the President to suspend payments by the banks to prevent the current runs and, thus, to halt the alarming numbers of bank failures.

[15] The remainder of the Trading with the Enemy Act was reactivated as to Germany at midnight, December 11, 1941. *Trading with the Enemy Act*, § 2 (50 U. S. C. A., appendix); *Markham* v. *Cabell*, 326 U. S. 404, 407 n. 2.

nated property in the United States in which "Norway or Denmark" or any national thereof has at any time on or since April 8, 1940, had any interest."

To confirm and clarify the President's action, Senator Wagner, at the instance of the Treasury Department, introduced into Congress the Joint Resolution, enacted on May 7, 1940 (54 Stat. 179; Appendix, p. 47).[16] Executive Order 8389 was an exercise by the President of the authority granted by this Joint Resolution. Initially, the Order dealt only with the local assets of Danish and Norwegian nationals. On June 14, 1941, the President extended its application to nationals of Germany, among others (Exec. Order 8785; 6 F. R. 2897). Executive Order 8389 followed, closely, the language of the Joint Resolution. Sec. 1 of the Order—the portion material here—provides as follows (5 F. R. 1400, as amended June 14, 1941, 6 F. R. 2897):

> "Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:
>
> "A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States);

[16] H. Rep. No. 2009, 76th Cong., 3rd Sess., 1940; S. Rep. No. 1946, 76th Cong., 3rd Sess., 1940; Sen. Wagner in 86 Cong. Rec., p. 5006.

"B. All payments by or to any banking institution within the United States;

* * * * * * *

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States."

* * * * * * *

The Joint Resolution—and the Executive Order—left much unsaid. Other than specifying the property and transactions covered, it did not define the scope of the granted powers. It specified no standards to which the Executive must conform in granting or withholding authority for any transaction. It afforded no remedy—in court or otherwise—to any person aggrieved by any action of the Executive.[17]

Despite these uncertainties, it is clear that the Joint Resolution of May 7, 1940, did not, and could not, empower the United States to expropriate frozen funds. The Fifth Amendment protects alien and citizen alike. The property of neither may be confiscated. *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489, 491-2. The Joint Resolution was intended merely to protect the assets here of Axis-invaded countries and their nationals from seizure by the Axis at gun point.[18] To this end the President was

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[17] At the commencement of the war, the Treasury controlled some $7,000,000,000 of frozen alien property. (H. Rep. No. 1507, 77th Cong., 1st Sess. 1941, p. 3.) It is a little startling to think that, under our form of government, the Executive would claim, as respondent does here, that the controls gave the Executive unbridled peacetime control over this huge amount of property so that he could, at will, forbid the courts to adjudicate with regard to it and preclude American citizens from satisfying legitimate claims out of it.

[18] The Joint Resolution was offered in Congress by Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out of the Resolution. In his own words,

"* * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of

given the peacetime power to screen transactions in frozen property and to withhold sanction from those resting upon Axis conquest. Legitimate transactions were to be unaffected.[19] The frozen property was to continue subject to the claims of Americans.[20]

Thus, Congress established the freezing controls as an instrument to be used solely against Axis aggression. They were a check on the use of frozen property by the Axis—not a device to immunize frozen funds from the legitimate claims of American citizens.

The Joint Resolution did not purport to restrict in any way the right of an American citizen to sue a blocked national *in personam* or by attachment of his funds. To imply such a restriction—as the courts below have done—would be to proscribe in peace what was clearly permitted even during the exigencies of war. It is settled—both at common law and under the Trading with the Enemy Act—that, despite the existence of war, a citizen may sue the enemy and attach his property. *Watts, Watts & Co.* v. *Unione Austriaca Navigazione etc.*, 248 U. S. 9; *Trading with the Enemy Act*, § 7(b); 137 A. L. R. 1369, note. Noth-

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the United States which is owned by these governments [Norway and Denmark] or their nationals" (86 Cong. Rec., 5006).

See also: Sen. Glass in 86 Cong. Rec., 5175-5176, and Sen. Connally in 86 Cong. Rec., 5007.

[19] "Mr. Wagner. * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate* to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. *If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws" (86 Cong. Rec., 5007). (Italics supplied.)

"Mr. Wagner. *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*" (Italics supplied.)

"Mr. Barkley. That is right" (86 Cong. Rec., 5175-5176).

[20] Senators Barkley and Wagner in 86 Cong. Rec., 5006.

ing in the Joint Resolution indicates any purpose to forbid in peace what was permitted under Sec. 5(b) in time of war. [Cf. Sec. 5(b), as enacted during the First World War (40 Stat. 411 and 40 Stat. 966) with the Joint Resolution (48 Stat. 1).] In essence, this is conceded by respondent's stipulation that the attachment of frozen property "was not forbidden" by the freezing controls and that "a license to institute the action and levy the attachment was in fact not required" (R. 66).

Since the Joint Resolution permitted suit, including attachment actions, against blocked nationals or alien enemies, the German banks would have no standing to assert the freezing controls as a defense to petitioner's attachment. Respondent—as successor to the German banks—has no better right (*supra*, p. 15).

Despite this, the Court below has permitted the claims of the German banks to prevail over the pre-war attachment of petitioner, an American citizen. As construed below, the freezing controls cloak the German banks with immunity from attachment of their property by American citizens. So construed, the controls are distorted from a check upon German nationals to a device for their protection. *Porter* v. *Freudenberg* [1915], 1 K. B. 857, 880.

B

The Secretary of the Treasury authorized the attachment of frozen funds.

While, as just shown, the freezing controls did not embrace attachments of frozen funds, it would not matter here if the fact were otherwise. The Congressional Joint Resolution empowered the President to authorize transactions in frozen property, even if they were within the ambit of the Resolution. By Executive Order 8389, Section 7, the President delegated this power to the Secretary of the Treasury. The manner in which the Secretary exercised this power in respect to the attachment of frozen funds is agreed upon here. It is formally stipulated in this case as follows (R. 65-7):

1. From the inception of freezing controls the Secretary of the Treasury ruled that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant, were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action."

2. "A license to institute the action [by attachment] and levy the attachment was in fact not required by the Treasury Department."

3. In all cases in which litigants proposed to sue by attachment and applied to the Treasury for a license to attach,[22] the Secretary made it clear that no license was necessary by a ruling or instruction of the following nature:

> "Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national."[22a]

4. The Treasury at various times licensed payments out of frozen funds to satisfy judgments in attachment actions, "notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor."

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[22] Such applications ran "into the hundreds." Brief (p. 39) of the Treasury Department as *amicus curiae* in *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332.

[22a] It matters not that this ruling was not made by license. Exec. Ord. 8389 empowered the Treasury to grant the authority not alone by "regulations * * * or licenses." It could do so by "instructions * * * or otherwise." The rights to attach frozen funds did not depend on the mode used by the Treasury in granting the authority, so long as the authority was given.

In so ruling, the Treasury merely complied with established law. The Trading with the Enemy Act permitted suit by attachment against blocked nationals or alien enemies (*supra*, p. 22). As the Treasury's authority rested solely on Section 5(b) of that Act, he did not limit (R. 65-6), and could not have limited, the bringing of such suits.

The Treasury took pains to assure the New York courts that it meant what it said when it ruled that frozen funds could be attached. As *amicus curiae* in *Comm. for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, the Treasury informed the New York State Court of Appeals that "From the terms of the statement [quoted in the stipulation of fact here (R. 66)], it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action".[23] The Treasury advised the New York Court of Appeals to hold "that the Courts of the State of New York do have jurisdiction to litigate by attachment of blocked properties the rights and liabilities of litigants, consistent with the administration by the Federal Government of the freezing control laws."[23] It urged the Court to uphold the attachment notwithstanding the fact that a license to levy the attachment had been sought by the Commission for Polish Relief and refused by the Treasury.[24]

The New York State Court of Appeals followed the Treasury's ruling. It upheld the attachment in the *Polish Relief* case, ruling that blocked funds may be attached and the action reduced to judgment, subject to a license under the federal controls as a condition precedent to payment of the attached blocked funds in satisfaction of the judgment. The state courts of New York have consistently adhered to this view of the controls—stipulated to here—

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[23] Brief (p. 39) of Treasury Dept. as *amicus* in *Comm. for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332.

[24] Brief (p. 41) of Treasury Dept. as *amicus* in *Comm. for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332.

in dealing with litigation involving blocked property. The litigation has been permitted to proceed, but payment of the judgment has been made to await the sanction of a federal license under the freezing controls.[25] On June 5, 1950, this Court approved this view of the controls. *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841.

Respondent concedes that the controls did not proscribe attachment of frozen funds. In his brief in the Court of Appeals (p. 24), he said:

> "Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated."

This concession, we believe, is decisive of the case. Since it is agreed that petitioner's attachment was permitted, petitioner's attachment levy under New York law effected (a) a seizure of the attached funds [N. Y. *Civ. Prac. Act*, Section 916, subdivision 3], and (b) the creation of a lien upon the attached funds to secure petitioner's state court judgment.[26] Both the Trading with the Enemy Act and the Fifth Amendment require that these rights of

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[25] *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113, 299 N. Y. 791, in which the U. S. appeared as *amicus*, aff'd 339 U. S. 841; *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. S. 2d 431, aff'd 272 N. Y. App. Div. 909, aff'd 297 N. Y. 1019, in which the U. S. appeared as *amicus*; *Feuchtwanger* v. *Central Hanover Bank & Trust Co.*, 288 N. Y. 342; *Metallo-Chemical Corp.* v. *Banque Transatlantique S.A.*, 188 N. Y. Misc. 596; *Bollack* v. *Societe General, etc.*, 263 N. Y. App. Div. 601; *R. & L. Goldmuntz, Sprl.* v. *Fisher*, 54 N. Y. S. 2d 635; *Drewry* v. *Onassis*, 188 N. Y. Misc. 912, 914, aff'd 272 N. Y. App. Div. 870; *Cable & Wireless, Ltd.* v. *Yokohama Specie Bank*, 191 N. Y. Misc. 567; *Suomen Pankki* v. *Bell*, 80 N. Y. S. 2d 821, 829.

At least one federal court has taken the same view. See *Sun Insurance Office, Ltd.* v. *Arauca Fund* (S. D. Fla.), 84 F. Supp. 516, 518.

[26] Resort must be had to New York law to determine the incidents of petitioner's attachment. *Clark* v. *Willard*, 294 U. S. 211, 213. The New York cases holding that an attachment impresses a lien on the attached property are cited *post*, p. 32, footnote 29.

the petitioner be respected. Respondent's vesting was subject to petitioner's attachment rights. *Trading with the Enemy Act*, Sections 8, 9; *U. S.* v. *The Antoinetta*, 153 F. 2d 138; *Miller* v. *Kaliwerke*, 283 F. 746, 757-8; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Mayer* v. *Garvan*, 278 F. 27, 34.

In the endeavor to check the force of his concession, respondent asserted below that, although the Secretary of the Treasury authorized an attachment under New York law, the attachment was null and void when levied. It would become validated *ab initio*, he argued, if and when the Treasury licensed payment of plaintiff's judgment in the attachment action.

Respondent misapprehends the attachment process. In New York—as elsewhere—an attachment to be good, must seize the property and impress it with a lien before the judgment—not later.

Respondent's view would require a wholesale revision of the law of attachment. The Treasury's ruling—stipulated to here—indicates no purpose so to revise the attachment law of New York or of any of the states. Nothing in the Joint Resolution of May 7, 1940 or in Exec. Order 8389 granted such legislative power.

In truth, *Pennoyer* v. *Neff*, 95 U. S. 714, 727, forbids a judgment resting upon an attachment having the attributes suggested by respondent. Under *Pennoyer*, it is only because the attachment has seized the property and brought it under the control of the court *before* judgment, that the Federal Constitution permits an adjudication binding the property seized. The power of the court to adjudicate "at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment." *Pennoyer* v. *Neff*, *supra*, p. 728. To paraphrase *Pennoyer* v. *Neff*, *supra*, p. 728, "The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid" if execution is licensed by the Treasury under the freezing controls, "and void if there be" no license.

It must be assumed that the Treasury understood these constitutional requisites of a valid attachment. The Treasury's ruling must be construed to have authorized an attachment which would fulfill those requisites, i.e., an attachment effective when levied. It cannot be construed to have authorized the courts to proceed in a manner which the Federal Constitution forbade. *Josephberg* v. *Markham*, 2nd Cir., 152 F. 2d 644, 659; *Fed. Trade Com.* v. *Am. Tobacco Co.*; 264 U. S. 298, 307.

There were practical reasons why the Secretary of the Treasury, in authorizing the attachment of frozen funds, should have intended a valid attachment. His, alone, was the responsibility of issuing or withholding the license needed before frozen funds could be applied to satisfaction of the judgment recovered in the attachment action. It was of concern to him—as well as to the litigants—that the judgment, payment of which was to be licensed, should have no patent infirmity.

By ruling that frozen funds could be validly attached, the Secretary removed all doubt as to the Constitutional validity of the judgment without impairing, in any way, his ability and right to screen the payment of the judgment for compliance with the policy underlying the freezing controls.

The Treasury did rule that a license was required to apply the frozen funds to the judgment. This in no way affected the validity of the attachment or the ensuing judgment. Their validity depended upon what took place prior to the judgment—not upon post-judgment facts. *Pennoyer* v. *Neff*, *supra*, page 728.

Both the Treasury and the Alien Property Custodian have licensed the transfer of attached frozen funds to satisfy judgments obtained in actions begun by unlicensed attachments of such funds (R. 66-7). Such action is inexplicable except upon the hypothesis that a valid attachment of frozen funds was permitted. Unless the attachment were valid, the judgment would be a nullity under *Pennoyer* v. *Neff*. It cannot be supposed that the Secretary, in ruling that a license was required to satisfy the

judgment out of frozen funds, meant to reserve the authority to license, as valid, payment of a judgment resting upon an attachment which would be a nullity under the construction of the controls attributed to him by respondent. The Treasury would have no occasion to license execution upon a void judgment. There would, indeed, be nothing to license.

Respondent's position would force the conclusion that both the Treasury and the Custodian have authorized the use of frozen funds to pay judgments patently void for constitutional reasons under *Pennoyer* v. *Neff*. Every garnishee bank and the Sheriff would now be open to suit by the defendant in the attachment action to recover the monies paid in satisfaction of these "void" judgments.

It is impossible to believe that the Treasury, in authorizing and encouraging litigants to proceed by attachment and persuading the New York Courts to uphold such attachments, intended consequences so monstrous. On the contrary, by licensing the transfer of the attached frozen funds to pay the judgments, the Treasury re-affirmed its stand that frozen funds were subject to valid attachment.

C

Petitioner's attachment is clearly valid under this Court's holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*. These cases—not *Propper* v. *Clark*—should have been followed here.

In *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113 and 791 and *Banque Mellie Iran* v. *Yokohama Specie Bank*, 299 N. Y. 143 and 791, the New York State Court of Appeals held that unlicensed voluntary transactions, in blocked Japanese funds, gave rise to valid rights in the transferees of the blocked property, which would support a judgment (enforceable *in rem* under *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 412), against the property of the blocked national (Yokohama Specie Bank) in liquidation proceedings conducted by the New York

Superintendent of Banking. Specifically, "* * * it was held that the provisions of Executive Order No. 8389, as amended, 12 U. S. C. A. § 95a, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate Federal license is obtained * * *" (299 N. Y. 113).

This Court affirmed these cases in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, notwithstanding that:

1. the judgment so affirmed enforced rights which arose out of unlicensed transactions in frozen funds;

2. the litigation and judgment had never been licensed by the Treasury;

3. the Treasury had twice refused to license payment of the claims sued on in the *Singer* case[27]; and

4. prior to the judgments, the Custodian had vested "The excess proceeds of the business and property in the State of New York of the Yokohama Specie Bank".

By its judgment, affirming these cases, this Court sanctioned the view of the freezing controls expressed by the New York State Court in the *Polish Relief* case and followed by it consistently since. It rejected the contentions advanced by respondent as *amicus* in the *Singer* and *Mellie Iran* cases and also urged by him below in this case. We believe it is fair to say that this Court, in affirming these cases, has approved the view—first espoused in the *Polish Relief* case—that the freezing controls did not prevent the creation of rights against frozen funds by litigation so long as payment of the judgment was made to await Federal license.

Under this Court's holding in *Singer* and *Mellie Iran*, petitioner was clearly entitled to prevail below. His case

[27] *Singer* v. *Yokohama Specie Bank*, 299 N. Y. 113.

not only parallels *Singer* and *Mellie Iran* but, in certain decisive aspects, is decidedly stronger. In *Singer* and *Mellie Iran* the transactions underlying the judgment were voluntarily engaged in by two blocked nationals. The transactions were wholly unauthorized under the freezing controls. Here, petitioner, an American citizen, attached the funds of the German banks *in invitum* and pursuant to admitted Treasury authority. The cause of action which underlay his attachment arose in 1937 (R. 49) and pre-dated the freezing controls.[28]

If, in *Singer* and *Mellie Iran*, the unauthorized blocked transactions[28a] there involved gave rise to enforceable rights, it follows, *a fortiori*, that petitioner's attachment, authorized under the freezing controls and levied to enforce a claim which pre-dated freezing, gave rise to a valid attachment lien. In deciding to the contrary, the court below held directly in conflict with the *Singer* and *Mellie Iran* cases.

The court below mistakenly assumed that this case was controlled by *Propper* v. *Clark*, 337 U. S. 472. The basis for such an assumption is destroyed by this Court's holding in *Singer* and *Mellie Iran* that the authority of the *Propper* case is limited to a "claim of title to frozen assets adversely to the Custodian" by one seeking "to deny the Custodian's paramount power to vest" 339 U. S. 841, 842-3. The instant case is distinguishable from the *Propper* case in both aspects.

(1) *Petitioner's attachment—in contrast to the receivership order in the Propper case—involved no claim*

[28] Since the transaction which underlays Zittman's attachment took place in 1937 (R. 48-49), it was not subject to the freezing controls which as to German nationals became effective June 14, 1941 (Exec. Ord. 8785, 6 F. R. 2897). This is in sharp contrast to the Singer and Mellie Iran claims which both *arose and were sued on* after the freeze date.

[28a] In the case of Banque Mellie Iran, the blocked Japanese transaction sued upon occurred on December 2, 1941—six days before we were at war with Japan.

of title. It created only the attachment lien required for in rem jurisdiction.

Under New York law, the levy of an attachment impresses a lien upon the attached funds at the outset of the action.[29] In this way, the preliminary seizure constitutionally necessary for *in rem* jurisdiction is achieved and the attachment action can proceed.[30] Title to the attached funds—despite the attachment—remains in the defendant.[31] Therefore, the attachment effects no transfer. There is no shift in title—as in *Propper* v. *Clark*—which requires the sanction of the Treasury under the Executive Order.

If the plaintiff in the attachment action recovers a judgment, the attached funds, when execution issues against them, are applied in satisfaction of the judgment (N. Y. *Civ. Prac. Act*, §§969, 645). If execution issues, then only—for the first time in the attachment action—does title to to the attached frozen funds become involved in the litigation. At the point of execution—and here alone—the freezing controls apply. It is the execution against the frozen funds which portends the change in title. It is the execu-

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[29] The effect of an attachment under New York law is well established. The levy of the warrant impresses a lien upon the attached property as "security for the judgment the plaintiff may recover." If the plaintiff recovers, "the lien becomes absolute, relating back to the time of the levy, and taking its priority from that date." *Fielmann* v. *Brunner* (1st Dept., 1874), 2 Hun 354, 356; *Van Camp* v. *Searle* (5th Dept., 1894), 79 Hun 134, 143, mod. 147 N. Y. 150; *Lynch* v. *Crary*, 52 N. Y. 181, 184; *Embree* v. *Hanna*, 5 Johns. 101, 103; *Logan* v. *Greenwich Trust Co.* (1st Dept., 1911), 144 App. Div. 372, 378, aff'd 203 N. Y. 611; *West Virginia P. & P. Co.* v. *People's Home Journal, Inc.* (1st Dept., 1931), 233 App. Div. 376, 378; *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190, 208; *Elkay Reflector Corp.* v. *Savory, Inc.* (C. C. A. 2nd, 1932), 57 F. 2d 161; *Steingut* v. *Nat. City Bk.* (S. D. N. Y., 1941), 38 F. Supp. 451, 452.

[30] *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 728, 733.

[31] *Klinck* v. *Kelly*, 63 Barb. 622; *Columbia Bank* v. *Ingersoll* (Sup. Ct. N. Y., 1888), 21 Abb. N. Cas. 241; *Starr* v. *Moore*, 22 F. Cas. No. 13315, 3 McLean 354. This is the rule generally. See 7 C. J. S. page 415.

tion—not the attachment or judgment—which must be licensed under the Treasury's ruling. So the Treasury itself has said (R. 66). Until execution upon the judgment, there has been, and can be, no transfer of title as in *Propper* v. *Clark, supra*. Here, it is conceded that execution has not issued (R. 5).

Since everything done by the state court, including entry of petitioner's judgment, was concededly authorized by the Secretary of the Treasury, since execution has not issued and since the parties are agreed that execution cannot issue without an appropriate federal license, it is clear that the proceedings in the state court have in no way impinged upon the federal controls. So this Court has held in the *Singer* and *Mellie Iran* cases. These cases—not *Propper* v. *Clark*—should have been followed below.

(2) *Only the rights of the German banks—not the Custodian's vesting power—is in issue here.*

Here, as in *Singer* and *Mellie Iran*, the Custodian's power to vest is not in issue. Respondent admits that the Custodian's vesting orders extend only to the residual interest in the attached accounts remaining in the German banks. Petitioner concedes that the Custodian is entitled to what he vested. Petitioner's point is that the Custodian has been awarded more than he vested. The judgment gives the Custodian the whole of the attached accounts free of petitioner's valid attachment rights.

It is true that, had the Custodian exercised his paramount power to vest by *res* vesting orders, he could have taken, summarily, the whole of the attached accounts. However, such *res* vesting orders, had they issued, would not have affected petitioner's rights by reason of the attachment. Despite such vesting, petitioner would still have the right to assert and enforce his attachment rights in a proceeding against the Custodian under Section 9 of the Trading with the Enemy Act. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 569; *Stoehr* v. *Wallace*, 255 U. S. 239, 245-6. The

Custodian would have to respect those rights. The vesting power—whether exerted by *res* or *right, title and interest* orders—is limited by the Fifth Amendment. The latter so requires. *Miller* v. *Kaliwerke, etc.*, 283 Fed. 746, 757-8; *Commercial T. Co.* v. *Miller*, 281 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79; *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479.

By choosing to vest only the right, title and interest of the German banks, as adjudicated by the Court, the Custodian waived his paramount right to immediate preliminary custody of the vested property and invited an adjudication which would—and here does—preclude a later Section 9 suit by petitioner. That the Custodian forced petitioner to adjudicate now and to forego a later suit under Section 9 of the Trading with the Enemy Act, did not in any way alter petitioner's rights. These must be respected here as well as in a Section 9 suit.

The Custodian's "paramount power to vest" is no more in issue here than it was in *Singer* and *Mellie Iran*.

Essentially, this case is like *Singer* and *Mellie Iran*. In the latter, the Custodian vested the excess assets of the New York agency of the Yokohama Specie Bank, in liquidation, remaining after satisfaction of the claims allowed in the liquidation proceeding. This parallels the scope of the vesting orders in the instant case. The claims of *Singer* and *Banque Mellie Iran* sustained by this Court will, if a license issues, necessarily diminish, *pro tanto*, the residue which the Custodian will take. Recognition of petitioner's attachment rights in the instant case would affect the Custodian in precisely the same way.

Since the Custodian's power to vest is not in issue here, there is no parallel between this case and *Propper* v. *Clark*.

The court below failed to observe that, in *Propper* v. *Clark*, the question was whether "the freezing order made invalid any subsequent *transfer of title* by judicial action" 337 U. S. 472, 477, and that there (a) this Court carefully premised its "determination on the purpose of Congress to prevent *shifts in title* to blocked assets," 337 U. S. 472, 486 and (b) expressly refused to decide "whether every deter-

mination of rights concerning blocked property in unlicensed litigation is voidable," 337 U. S. 472, 486. (Emphasis supplied.) The lower court overlooked the fact that this Court very carefully limited its holding to the particular facts of the *Propper* case and reserved for future decision the impact of the freezing controls in other cases. The rule for other cases has now been made in *Singer* and *Mellie Iran*. By these cases this Court has decided that the freezing controls permitted a valid determination of rights concerning blocked property even though both the litigation and the transaction underlying it had not been authorized by federal authority so long as the judgment was not consummated by a change of title. In the instant case, not only is title to the attached funds unchanged by the attachment or judgment but it is conceded that petitioner attached with federal authority, to enforce a cause of action which arose in 1937 before the effective date of freezing. For these reasons, the instant case—even more than *Singer* and *Mellie Iran*—falls beyond the range of the *Propper* case.

* * * * * * * *

Since the Custodian may confiscate only the interests of the German banks in the vested bank accounts and since, by his attachment and judgment, petitioner acquired valid rights in the vested bank accounts superior to those of the German banks, the courts below erred in granting a decree to respondent which destroys petitioner's rights.

III

General Ruling No. 12, issued April 21, 1942, cannot be employed to defeat petitioner's attachment because the Ruling (a) does not have retroactive force and (b) if properly construed, permits a valid attachment of frozen funds.

On December 11, 1941—when petitioner attached—the freezing controls rested wholly on the Joint Resolution. It is stipulated here that, under those controls, the Treasury made "no attempt to limit" attachments (R. 66).

Respondent does not claim that there was any impediment to petitioner's attachment on December 11, 1941. He contends, however, that the validity of what was done on December 11, 1941, must be tested by General Ruling No. 12 (7 F. R. 2991), issued over four months later on April 21, 1942.[32] He says that General Ruling 12 must be applied retroactively and that, so applied, it voids petitioner's attachment. We believe that respondent misapprehends the force of the Ruling.

A

General Ruling No. 12 cannot operate retroactively.

General Ruling 12 was issued on April 21, 1942—more than four months after petitioner had attached.[33] It had the sanction of harsh criminal penalties (Exec. Order 8389, Sec. 8). Therefore, the Constitution forbade its application retroactively to void petitioner's attachment. *Addy* v. *U. S.*, 264 U. S. 239, 244-245; *Chew Heong* v. *U. S.*, 112 U. S. 536.[34] This was fully appreciated by this Court, when it said in *Propper* v. *Clark*, 337 U. S. 472, 485:

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[32] Gen. Ruling 12 was adopted on April 21, 1942. The Treasury's brief as *amicus* in the *Polish Relief* case is dated, and was filed, on April 22, 1942. The intimation is present in the Treasury's brief (p. 30, footnote 6) that Gen. Ruling 12 was adopted to shape the holding of the N. Y. Court of Appeals in the *Polish Relief* case. One commentator has said the following regarding this sequence of events:

> "* * * This ruling was issued on April 21, 1942, and forms the basis for Point II in the Treasury brief, pp. 30-37, entitled 'Unauthorized Transfers of Property in Blocked Accounts are Invalid under General Ruling No. 12.' The brief was filed on April 22, 1942. Such incidents can hardly engender confidence in, or respect for, administrative practice * * *." Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 Harv. L. R. 30, at p. 67, footnote 158.

[33] Petitioner's judgment in the state court attachment action was entered on March 27, 1942. Thus, the judgment, too, antedated Gen. Ruling No. 12.

[34] Apart from constitutional limitations, Gen. Ruling 12 could not be given retrospective force. Administrative orders and rulings, as well as statutes, are not construed to operate retrospectively. *Miller* v. *U. S.*, 294 U. S. 435, 439; *Standard C. & M. Corp.* v. *Waugh C. Corp.*, 231 N. Y. 51.

"General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as decisive in this case. It is useful only as a statement of the administrative determination as to the effect of the litigation without a license."

General Ruling 12 may apply to attachments made after it is issued. It cannot, in any legitimate sense, be a guide for construing the Secretary's earlier ruling—found in the stipulation here—issued in execution of the restricted authority of the Joint Resolution. The latter was the sole Congressional authority for the controls when petitioner attached on December 11, 1941.[35] *Ex parte Endo*, 323 U. S. 283, 302. It is conceded that nothing in the Joint Resolution or the Executive Order forbade petitioner's attachment.

B

Properly construed, General Ruling No. 12 authorized a valid attachment of frozen funds.

Even if the Constitution did not forbid the retroactive application of General Ruling No. 12, the Ruling itself, properly construed, would sanction petitioner's attachment on December 11, 1941. Subd. (3) of General Ruling No. 12, provides that a transfer, if, at any time, licensed or **otherwise authorized** by the Secretary of the Treasury, is "enforceable to the same extent as it would be valid or enforceable but for * * * section 5(b) of the Trading with the Enemy Act," Exec. Order 8389 and regulations thereunder. (Emphasis supplied.) Since, concededly, petitioner's attachment was so authorized, its validity is expressly confirmed by Gen. Ruling No. 12.

[35] Under the holding in *Lyon* v. *Singer* and *Lyon* v. *Banque Mellie Iran*, 339 U. S. 841, even the First War Powers Act—enacted later—did not prevent the creation of valid rights in frozen funds as the result of unlicensed litigation.

Further, subd. (4) of Gen. Ruling 12—on which respondent relies—expressly makes "valid and enforceable" any transfer involved in, or arising out of any court proceeding "for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated." In every attachment action the right of the Court to attach the property is necessarily one of the matters litigated and concluded by the judgment. *Ackerman* v. *Tobin*, 8th Cir., 22 F. 2d 541; *Green* v. *Van Buskirk*, 74 U. S. 139, 148. Therefore, the state court's judgment in favor of petitioner against the German banks was an adjudication, binding on the German banks, that the funds were validly attached. As respondent was in privity with the German banks, he is equally bound by the judgment.

Respondent, ignoring subd. (3), insists that subd. (4), while permitting an adjudication of the rights and liabilities of the parties, must be read—due to the proviso [35a]—as insulating the property which is the object of the suit from all of the consequences of the litigation until the judgment is licensed. This is a manifest contradiction. Where, as here, the suit is brought to fix the rights and liabilities of the parties in the attached property, the property must be seized at the outset of the suit and the judgment must affect the property when made. Otherwise, under the Fourteenth Amendment, the judgment decides nothing. *Pennoyer* v. *Neff*, *supra*. Respondent's view of subd. (4) is, in effect, that it purports to permit an adjudication of rights and liabilities effective only if and when a post judgment license issues, whereas the law of *Pennoyer* v. *Neff*, forbids such an *in rem.* adjudication. So construed, subd. (4) becomes an untintelligible contradiction and void under the Fifth Amendment. *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *U. S.* v. *Cohen Grocery Co.*,

[35a] We call attention to the fact that nothing comparable to the limiting language of the proviso appears in the authority to attach given by the Secretary of the Treasury prior to Gen. Ruling 12 (R. 66). On the contrary, under the prior authority "No attempt to limit" attachments or suits was made.

255 U. S. 81; *Standard C. & M. Corp.* v. *Waugh C. Corp.*, 231 N. Y. 51.

Since Subd. (4) purports to permit actions competent validly to determine "the rights and liabilties therein litigated", it must be considered to permit a valid attachment. Otherwise, where the action is *in rem.*, subd. (4) fails to achieve its expressed purpose.

To construe the General Ruling as authorizing a valid attachment of frozen funds is to make it valid and meaningful. To give it respondent's construction is to make it illogical, contradictory and opposed to the dictates of the Fifth and Fourteenth Amendments. Given this choice, the interpretation which is meaningful and constitutional should be adopted. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Texas & P. R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *LaFranca*, 282 U. S. 568, 574; *Josephberg* v. *Markham*, 152 F. 2d 644, 659.

IV

The District Court should have refused to entertain this cause.

Six years before this proceeding was begun the state court, by an *in rem* judgment, had adjudicated the rights of petitioner and the German banks—through whom respondent claims—in the attached accounts. The adjudication necessarily decided, as between petitioner and the German banks, that the bank accounts were attachable. *Ackerman* v. *Tobin*, 8th Cir. 1927, 22 F. 2d 541, cert. den. 276 U. S. 628; *Clark* v. *Williard*, 294 U. S. 211, 213.

The state court adjudication, being *in rem*, is binding on respondent, who is in privity with the German banks. *In rem* judgments cannot be reviewed in collateral proceedings. Restatement of the law, *Judgments* § 34, g; *Ackerman* v. *Tobin*, *supra*.

Therefore, the District Court should have refused to decree the invalidity of the state court's seizure of the attached funds and its judgment which, under *Pennoyer*

v. *Neff*, 95 U. S. 714, derived validity solely from that seizure. Such is the measure of deference owed, as a matter of comity, between state and federal courts in contests over a *res* and, as a matter of right, under the full faith and credit clause of the Federal Constitution.

A

The judgment below is an unlawful collateral attack on the state court judgment.

The judgment of a court having jurisdiction, even if erroneous, may not be attacked in a collateral proceeding. Errors leading to the judgment must be corrected by the court which rendered the judgment or by appeal therefrom. The rule applies to judgments *in rem*, based on attachment, as well as those *in personam*. *Cooper* v. *Reynolds*, 77 U. S. 308, 319; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 367.

Petitioner's judgment against the German banks bound the attached bank accounts. Whether rightly or not, the bank accounts were seized and in the custody of the state court. N. Y. *Civ. Prac. Act*, § 916(3). Respondent tacitly recognized this fact, when he disavowed all right to a money judgment against the Chase Bank so long as the attachment levy stood. Here—in contrast to his method in *Propper* v. *Clark*—he chose merely to seek an adjudication that the state court judgment was invalid, not a money judgment. His position is, in essence, that although the state court seized the bank accounts, it should not have done so.

Such an attack challenges—not the power of the state court to deal with the attached funds but—the propriety of its having done so. *Grant* v. *Leach & Co.*, 280 U. S. 351, 359; *Chandler* v. *Peketz*, 297 U. S. 609.

Of such an attack this Court, speaking through Brandeis, J., said in *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 90:

> "* * * But if the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in

that court. * * * If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wiswall* v. *Sampson*, 14 How. 52, 14 L. ed. 322. But the judgment of the state court, which had possession of the *res*, could not be set aside by a collateral attack in the federal courts. *Mutual Reserve Fund Life Asso.* v. *Phelps*, 190 U. S. 147, 159, 160, 47 L. ed. 987, 995, 23 Sup. Ct. Rep. 707. Nor could it be ignored. *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570. Lower federal courts are not superior to state courts."

The judgment of the state court in petitioner's attachment action was binding until set aside in a direct proceeding. The power of the District Court was coordinate with—not superior to—that of the state court. Under the *Karatz* case it was bound to respect the judgment of the state court, not review it. This obligation follows from judicial precedent. *McLain* v. *Lance*, 5th Cir., 1944, 146 F. 2d 341, 345; *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, 477; *Nougue* v. *Clapp*, 101 U. S. 551; *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-626.

It follows, too, from the solemn injunction of the full faith and credit clause of the Federal Constitution. *U. S. Constitution*, Art. IV, Sec. 1; 28 *U. S. Code*, § 687; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166; *Milwaukee County* v. *White Co.*, 296 U. S. 268; *Sanders* v. *Armour Fertilizer Works*, 292 U. S. 190; *Green* v. *Van Buskirk*, 74 U. S. 139; *Steingut* v. *National City Bank*, 38 F. Supp. 451; *Ackerman* v. *Tobin*, 8th Cir., 1927, 22 F. 2d 541; *Loewe* v. *Savings Bank of Danbury*, 2nd Cir., 1916, 236 F. 444, 448.

Since the German banks could not collaterally attack the state court's judgment, it was not open to respondent—their privy—to do so. *Mitchell* v. *First Nat. Bank*, 180 U. S. 471, 481; *Bigelow* v. *Old Dominion Copper Min. & S. Co.*, 225 U. S. 111, 129.

B

The judgment below interferes with the state court's custody and control of the attached debts in violation of the traditional rule of comity between state and federal courts.

For almost a hundred years it has been the settled rule of comity that, "when a state court and a court of the United States may each take jurisdiction of a matter [involving a *res*], the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231; *Freeman* v. *Howe*, 24 How. 450. The rule is one of right. It arises from the necessity, in a federal system such as ours, of avoiding unseemly conflicts between our independent state and federal tribunals. This Court has acknowledged a "long recognized duty * * * to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States'." *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477.

The rule binds the Government even when pursuing a federal right. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479.

The state court was the first to take jurisdiction. The Sheriff, in levying petitioner's attachment, acted as an officer of the state. *Stojowski* v. *Banque de France*, 294 N. Y. 134, 135. By his levy, the state "seized" the attached debts.[36] N. Y. *Civ. Prac. Act*, §916 (3). The debts were then impressed with a lien to secure petitioner's recovery.

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[36] The seizure was constructive since intangibles are not capable of manual seizure. In law, such a seizure is the equivalent of a manual seizure. *Comm. for Polish Relief* v. *Banca Nationala a Rumaniei*, 262 App. Div. 543, aff'd 288 N. Y. 332; *Security Savings Bank* v. *California*, 263 U. S. 282, 286; *Harris* v. *Balk*, 198 U. S. 215, 222, 223.

(See cases cited, *supra*, p. 32, footnote 29). The Chase Bank was bound by the seizure and lien. The statutory injunction forbade it "to make or suffer, any transfer or other disposition of, or interfere with * * * or pay over or otherwise dispose of any debt so levied upon * * * to any person, or persons, other than the sheriff serving" the warrant "except upon direction of the sheriff or pursuant to an order of the court". N. Y. *Civ. Prac. Act*, §917 (2). Disobedience by the Chase Bank would have meant fine and imprisonment as for a contempt. N. Y. *Judiciary Law*, §§ 750(3), 753(3), (8). And the sheriff was empowered to sue to compel payment of the debt to him. N. Y. *Civ. Prac. Act*, § 922.

By this constructive seizure, the state court took exclusive custody and control of the attached debts. *U. S. of Mexico* v. *Schmuck*, 294 N. Y. 265, 268; *Cooper* v. *Reynolds*, 10 Wall. 308, 316, 317; *Beardsley* v. *Ingraham*, 183 N. Y. 411, 420. Exclusive jurisdiction over the *res* so obtained continues in the state court "until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231. Here this event would occur only when petitioner's judgment was satisfied out of the attached funds. N. Y. *Civ Prac. Act*, §§ 645, 520; *U. S. of Mexico* v. *Schmuck*, 294 N. Y. 265, 268.

With the attached debts so firmly lodged in the custody of the state court, it is clear that respondent could not have sued in the District Court for a money judgment. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463. Respondent must have been cognizant of this bar when he chose to sue here for declaratory relief only. Did this choice of remedy reconcile the proceeding with the traditional rule of comity between state and federal courts? We believe not.

Respondent's position, as stated in his brief in the District Court, was that "only a declaration of rights" was sought. No order was asked "directing that the funds be surrendered to him." He admitted, however, that the declaration sought "will interfere with the possession of

the state court * * * to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here." This is to say that, by reason of the District Court's decree, the state court must void its custody and surrender the *res*. It is precisely this—an adjudication of the state court's title—which the rule of comity was designed to prevent. *Ex parte Baldwin*, 291 U. S. 610, 616; *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 89; *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-626.

The issue tends to be obscured here because the seizures were symbolic.[37] Petitioner's seizure rests upon the declaration of the statute, fortified by injunction. N. Y. *Civ. Prac. Act*, §§ 916(3), 917(2). Respondent's seizure rests upon his declaration, i.e., his vesting order and demand. Since both seizures rest upon declarations, they can be rescinded by declarations. The District Court has done precisely this. Disregarding the State Court's injunction, it has rescinded the State Court's seizure by declaring that none occurred, leaving respondent's seizure fully effective. That we are dealing here with symbolisms, should not obscure the fact that the District Court, by nullifying petitioner's attachment, has, in practical effect, laid its hand upon the property in dispute. It is this which the rule of comity forbids.

Markham v. *Allen*, 326 U. S. 490, does not hold otherwise. There, only rights *in personam* were involved. The Custodian did not—as here—attack the decree of probate or the right of the State Court to administer the estate. He recognized the validity of the State Court judgment and merely asked that he be permitted to take the fruits of it. This distinction is decisive. *U. S.* v. *Klein*, 303 U. S. 276.

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[37] The Custodian's vesting order and demand were an *ex parte* seizure of the bank accounts in question. *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 191; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 55. His application to the District Court was merely in aid of "the seizure which he effected at the time of his demand." *Miller* v. *Kaliwerke, etc.*, 2nd Cir., 283 F. 746, 752.

Petitioner's attachment was also an *in rem* seizure. *Pennoyer* v. *Neff*, 95 U. S. 714, 727; N. Y. *Civ. Prac. Act*, § 916(3).

282. *Markham* v. *Allen* would parallel the instant case only if in *Markham* the Custodian had premised his claim upon the invalidity of the executor's title or the nullity of the State Court's probate decree.

The vice of the decree below is not cured merely because the decree is declaratory and does not direct the Chase Bank to pay the attached debts to respondent. If the decree stands, *res adjudicata* will leave the state court no choice, as respondent himself notes, except to surrender custody of the attached debts so that they may be paid to respondent. The overtones of a plea of res adjudicata may seem gentler than the harsh directive of an order to pay. In actuality, the compulsion of the one is equally as forceful, ultimately, as that of the other. Whichever means is employed the end is the same—the state court is forced to surrender its jurisdiction. Neither method concedes to that court the respect which the rule of comity requires.

Since the State Court was the first to take jurisdiction here, the District Court, in obedience to the rule of comity, should have remitted the Custodian to that forum. The State Courts have shown themselves fully competent—and indeed, eager—to accord the Custodian every right to which he is entitled. *Matter of Viscom*, 270 N. Y. App. Div. 732; *Stern* v. *Newton*, 180 N. Y. Misc. 241. Therefore, the breach of comity here cannot be excused by any plea of necessity.

If, as here, the District Court may destroy the State Court's custody in contravention of the State Court judgment and injunction, the rule of comity becomes a mere form wholly denuded of its substance.

C

Declaratory relief should have been denied because respondent had an adequate and summary remedy in the prior state court proceeding.

For some unstated reason, respondent chose to test the validity of petitioner's attachment in the District Court.

Ever since the warrant was levied, the State Court has been —and still is—open to a summary application by respondent to test the validity of petitioner's attachment. N. Y. Civ. Prac. Act, § 948. Had respondent chosen so to act he could have obtained in one stroke, if so entitled, an adjudication of his title and a surrender by the State Court of its custody of the attached accounts. On such an application, the State Court, equally with the District Court, would have been bound to enforce the Federal law. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479.

Respondent admits that, despite the judgment below, he must still apply to the State Court to surrender its custody in order to enforce the rights decreed below. Upon such an application, the State Court may well inquire whether, under the full faith and credit clause of the Constitution, it is bound to recognize the judgment of the District Court as against its own. *Peck* v. *Jenness*, 7 How. (U. S.) 612, 624-626: *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475-477; *Nougue* v. *Clapp*, 101 U. S. 551.

By choosing two proceedings to accomplish that which might have been done on one application to the State Court, respondent has multiplied the litigation. Even worse, he has needlessly pitted the District Court against the State Court. The District Court should have refused to entertain this cause. *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491; *Carbide & Carbon C. Corp.* v. *U. S. I. Chemicals*, 4th Cir. 1944, 140 F. 2d 47; *McLain* v. *Lance*, 5th Cir. 1944, 146 F. 2d 341.

CONCLUSION

It is respectfully urged that the judgments of the District Court and the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * * * *

2. Executive Order No. 8339, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897.

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * * * *

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991.

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury (a) any transfer after the effective date of the Order [Exec. Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

* * * * * * *

(3) Unless otherwise provided an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however*, That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

* * * * * * *

4. New York Judiciary Law.

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

* * * * * * *

3. Wilful disobedience to its lawful mandate.

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§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

* * * * * * * *

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

* * * * * * *

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

5. New York Civil Practice Act.

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§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publication pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

§ 916. The attachment may also be levied upon:

* * * * * * *

3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; * * *.

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

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§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual

delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action of special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative.

§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.